United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 28, 2010

TO : James J. McDermott, Regional Director

Region 31

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Writers Guild of America-West

(ABC, Inc.; Corday Prod. Inc.; Bill Bell Dramatic Serial Co.)

Case 31-CB-12451, 31-CB-12452, 31-CB-12456

Writers Guild of America-East

(Corday Prod. Inc.; Bill Bell Dramatic

Serial Co.; ABC, Inc.)

Case 31-CB 12453, 31-CB-12454, 536-1200 31-CB-12455 548-4060

548-6030-3390-5000

These cases were originally submitted for advice as to whether the Unions violated Section $8(b)\,(1)\,(A)$ and $8(b)\,(2)$ of the Act by filing a grievance and requesting arbitration over a claim that the Employers had failed to abide by a strike settlement agreement that gave returning strikers employment preference to over strike replacements. In an Advice Memorandum of March 31, 2009, [FOIA Exemption 5]

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Exemption 5

 $].^2$ The matter was resubmitted at the conclusion of the arbitration proceedings.

We conclude that the Region should dismiss the charges in the instant cases, absent withdrawal, given that the

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^{1 [}FOIA Exemption 5

² [FOIA Exemption 5

arbitral record does not clearly demonstrate that the Unions sought a long-term continuing employment preference for strikers, the lawfulness of a preference for a short period of time after the end of the strike is a close question, and the Unions apparently acquiesced to the arbitrator's dismissal of their claims.

FACTS

For many years, the Writers Guild of America West, Inc. and the Writers Guild of America East, Inc. (the Unions) have been the collective-bargaining representatives of writers of television daytime dramas employed by television production companies, including ABC, Inc., Bill Bell Dramatic Serial Co., and Corday Productions, Inc. (the Employers). The Employers are represented in collective bargaining by the Alliance of Motion Picture and Television Producers (the AMPTP). Pursuant to the parties' Minimum Basic Agreement ("MBA"), these writers generally work under 13-week or 26-week individual employment contracts referred to as personal service agreements (PSAs). While the MBA provides no protection of writers' continued employment after the expiration of their PSAs, it appears that writers' PSAs are generally renewed as long as the shows' producers are satisfied with the writers' work. PSAs are subject to the MBA's "pay or play" provision, which permits a producer to terminate a writer's services during the term of a PSA as long as the producer pays the writer the remaining money due under the PSA.

From early November 2007 through mid-February 2008,³ the Unions engaged in a strike against the Employers and the AMPTP. While the strike prevented or postponed production of many prime time television shows, the Employers were able to continue production and airing of their daytime dramas during the strike by using the writing services of supervisors, strike replacements, and/or crossovers.

At the conclusion of the strike, the AMPTP and the Unions entered into a strike termination agreement (STA), which provided for the strikers' reinstatement with as much time remaining in their PSAs as when the strike began. The STA further provided that "no replacement writer hired during the strike period shall be retained on a show over a striking writer who offers to return to work on the same show on which he or she was employed when the strike began." The STA also provided that the Agreement did not "expand or diminish [the Employers'] right . . . to fulfill

³ All dates hereinafter are in 2008, unless otherwise noted.

any reinstatement obligations under this Agreement by the payment of compensation under a writer's PSA. In other words, this Agreement does not change [the Employers'] 'pay or play'" rights under the MBA.

The Employers either offered reinstatement to all of the striking writers covered by the STA or paid out the remaining periods of their PSAs. The Employers, however, did not displace all of the replacement writers. Some of the Employers increased the number of writers they employed and employed both former strikers and replacements, and some made payments to former strikers in lieu of reinstatement and employed only replacements. Thereafter, as the reinstated writers' PSAs expired, the Employers declined to renew some of those PSAs while retaining or reemploying strike replacements and/or writers who had not been employed before or during the strike.

In April and June, the Unions filed grievances and arbitration claims, alleging that the Employers violated the STA by continuing to employ strike replacements while denying employment to strikers. The grievances themselves gave no additional explanation of the basis for the Unions' claim. The Unions and the Employers agreed to bifurcate the arbitrations, first addressing whether the Employers violated the STA at all, and then addressing the extent of liability and the award sought by the Unions only if the arbitrator found a contract violation.

The first scheduled arbitration proceeding involved the Unions' claims against Employers Bell and Corday. In their briefs to the arbitrator, the Unions set forth the basis for their grievance, including their view of the relationship between the contractual "pay or play" provision and the STA reinstatement provision:

The exercise of the Companies' pay or play rights did not end the striking writers' employment. Rather, the effect of such action was only to eliminate the striking writers' obligation to render services during the employment period(s) remaining in their then current PSAs. When the Companies refused to accept offers by each of the striking writers to continue employment on his or her show after the expiration of their pre-strike PSA, and instead retained replacement writers on their respective shows, the Companies violated the STA.

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The STA contains a clear statement that replacement writers will not be retained over

striking writers who offer to return to work. The STA places no time limitation on this grant of preferred status to striking writers over replacement writers. Thus, as long as there is a striking writer who offers to continue his or her employment on a show, the Company may not reject that offer and choose instead to retain a replacement writer.

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The use of the terms "return" -- i.e. to go to or come back to an earlier condition -- and "retain" --- i.e. to keep or to hold in a particular place or condition -- is significant. The use of the word "return" with regard to the post-strike status of a striking writer implies that, if he or she offers to do so, the writer will go back to his or her show and continue to render writing services on that show.

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the Companies were not entitled to keep or hold a replacement writer on the show if it did not also honor all of the striking writers' offers to go back to providing writing services on the show. The Companies' refusal to permit the striking writers to go back to providing services on their shows, while keeping the replacement writers in their positions on those shows violated the STA.

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The primary purpose of the STA was to return as many writers to work on their shows as possible. In this context, the inclusion of a provision in the STA prohibiting a Company from continuing to employ replacement writers after the strike ends makes sense as it serves the primary purpose of the STA. By contrast, if the STA permitted a Company to "retain" replacement writers in positions to which the striking writers could "return", the number of positions to which the striking writers could "return" would be reduced.

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Since this Arbitrator must presume that the bargaining parties to the STA did not intend to include extraneous provisions, the Arbitrator must ascribe a meaning to each of [the STA reinstatement and "pay or play" provisions] in a

manner that does not create conflict with the other. There is only one way in which this Arbitrator can accomplish this task: this Arbitrator must conclude that the seemingly conflicting provisions are independent of one another.

Having accepted this precept, this Arbitrator should find that under the STA a Company's exercise of its pay or play rights merely satisfies the payment obligations of a striking writer's pre-strike PSA. If, after the period of time covered under that PSA has elapsed, the striking writer offers to return to work, the Company may not retain a replacement writer over that striking writer.

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The Companies have not cited a single case -- and our research has not disclosed one -- holding that such a preference may only be afforded immediately upon the end of a strike. Here, the parties did not so limit the preference for returning strikers, and the Arbitrator should give effect to their agreement.

In addition, at the arbitration hearing, counsel for the Unions agreed with counsel for the Employers' statement of the issues saying that the Unions contended that, if there were additional PSA cycles left in the writer's contract which were optional from the employer's standpoint, or even if the contract had totally expired, the STA prohibited any of the Employers from letting go the striking writer as long as there are still strike replacements working. Counsel for the Unions also added that, after Employers exercised their "pay or play" rights and terminated the employment of former strikers, it doesn't really matter whether the writers' contracts were still in effect. Rather, what mattered was that the former strikers were willing to come back to work:

After counsel for the Employers set forth their interpretation of the STA to be that "there was no extension of your agreement beyond whatever your period was," counsel for the Unions relied, "And our position is that they should have been offered reemployment over the replacement writers."

Counsel for the Unions also stated:

the context we have here is we're not seeking a permanent advantage.

* * * * *

[the STA] says no replacement writer hired during — shall be retained on a show over a striking writer who offers to return to work on the same show on which he or she was employed when the strike [began]. I mean, that's the language we're looking for. There's no time limit in the contract.

On January 6, 2010, the arbitrator issued a Decision and Award denying the Unions' Bell and Corday grievances. The arbitrator held that the Employers did not violate the STA by employing replacement writers instead of former strikers, finding that the Employers had no obligation to employ striking writers after the expiration of their PSAs.

On January 20, 2010, the WGAE withdrew its arbitration demand in the grievances against ABC. On January 26, 2010, counsel for the Unions requested that the instant charges be dismissed as moot, stating that the Unions would abide by the award of the arbitrator and giving assurances that there will be no further effort to seek reinstatement of the striking writers.⁴

ACTION

We conclude that the Region should dismiss the charges in the instant cases, absent withdrawal, given that the arbitral record does not clearly demonstrate that the Unions sought a long-term continuing employment preference for strikers, the lawfulness of a preference for a short period of time after the end of the strike is a close question, and the Unions apparently acquiesced to the arbitrator's dismissal of their claims.

As we discussed in our initial memorandum in these cases, it is well established that the Board extends to arbitration proceedings the rule of <u>Bill Johnson's</u> that a state court lawsuit may be enjoined if it has "an objective that is illegal under federal law." A union's grievance

⁴ The Unions' press release about the arbitration remains in the publicly-available archives section of their websites.

⁵ 461 U.S. at 737 fn.5. Absent an illegal objective, a suit may not be enjoined if it has a reasonable basis in fact or law. See, e.g., Longshoremen Local 7 (Georgia-Pacific), 291 NLRB 89 (1988), enfd. 892 F.2d 130 (D.C. Cir. 1989) (policy favoring private resolution of labor disputes

seeks an "illegal objective" if the outcome sought by the union would itself violate the Act. For example, in Electronic Workers Local 221 (Kidder, Inc.), the Board found that a union's submission of a grievance to arbitration violated Section 8(b)(1)(A) and (2) where the grievance sought to have a lawful superseniority clause interpreted in an unlawful fashion.

The issue in the instant cases is whether, as the Employers assert, the Unions' grievances sought to provide former strikers with an unlawful preference in employment over strike replacements. It is well established that employers or unions may not condition employment on employees' decisions to support or not support a strike. In Erie Resistor, the Board and Supreme Court held that an employer's grant of permanent 20-year superseniority to striker replacements or strikers who abandoned the strike was inherently destructive of important employee rights and unlawful. There, the Board and Court emphasized the

analogous to the states' interest in the maintenance of domestic peace and parallels the First Amendment concerns emphasized by the Supreme Court in Bill Johnson's); Hotel and Restaurant Employees Local 274 (Warwick Caterers), 282 NLRB 939, 940-941 (1987), supplementing 269 NLRB 482 (1984) (no 8(b)(1)(A) violation where union sought to use a grievance to apply contract to employees the Board ultimately found the union did not represent; absent a prior contrary determination by the Board, it was not unreasonable for the union to try to have an arbitrator resolve the dispute).

⁶ Cf., e.g., Elevator Constructors Local 3 (Long Elevator), 289 NLRB 1095, 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) ("[b]ecause we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the presentation of the grievance coercive, notwithstanding the Supreme Court's decision in Bill Johnson's").

⁷ 333 NLRB 1149, 1152 (2001).

^{8 &}lt;u>Ibid</u> ("[i]t is clear that these 'benefits' . . . would be discriminatory and, therefore, unlawful").

⁹ See, e.g., Local 457, United Rubber, Cork, Linoleum, etc. (Kentile, Inc.), 147 NLRB 980, 980-981, 985 (1964) (illegal for union to interfere with post strike employment of crossovers through use of pretext); House of the Good Samaritan, 320 NLRB 421, 427-428 (1995) (illegal to restrict future rights to reinstatement based on employee's participation in strike).

inherently destructive effects of the permanent superseniority at issue, in that it created an ever-present reminder of the dangers of striking. Here the Employers argue that the Unions' proposed interpretation of the STA had the same destructive effect on the replacement employees' right to refrain.

As we further discussed in our initial memorandum in these cases, however, an agreement providing that economic strikers will be reinstated is permissible, even if this results in strike replacements being displaced. The Board does not view employment preferences for strikers over replacements immediately following a strike as inherently destructive of employee rights. [FOIA Exemption 5

if the Unions did not seek a continuing or long-term preferences for strikers, but instead merely sought an interpretation of the STA that provided for a one-time striker reinstatement preference, this would arguably be a lawful objective even if the striker reinstatement preference was not limited solely to the immediate conclusion of the strike, but instead extended to the time that each striker's PSA expired.

We conclude that the evidence does not clearly establish that the Unions sought a long-term continuing preference for the former striking writers. Initially, we note that the Unions have repeatedly asserted that they were not seeking "a permanent advantage" for the strikers, and expressly stated so at the arbitration hearing. At no time did the Unions expressly assert that the STA gave the

^{10 132} NLRB at 627-629, ("the discrimination effected by superseniority lasts indefinitely"; "superseniority is a continual irritant to the employees and to the Union"; "superseniority stands as an ever-present reminder of the dangers connected with striking and with union activities in general"); 373 U.S. at 231 ("the plan here creates a cleavage in the plant continuing long after the strike is ended"; "this breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general").

¹¹ See <u>Brooks and Perkins</u>, 282 NLRB 976 (1987); <u>Portland</u> Stereotypers', etc., Union, No. 48, 137 NLRB 782, 786 fn. 6 (1962).

former strikers a long-term or continuing preference. Rather, while the exact parameters of the Unions' arguments are not entirely clear, the Unions repeatedly emphasized that what they were seeking was the "return" or "re-hire" of the striking writers, that they be allowed to "go back" to work. Indeed, the Unions even offered a dictionary definition of "return," i.e., "to go to or come back to an earlier condition" in support of its interpretation. All of these terms can reasonably be read to indicate that the Unions sought a one-time event, rather than a continuing obligation on the part of the Employers to retain or continue to employ the former strikers in perpetuity.

Moreover, the Unions emphasized that the root of their disagreement with the Employers' interpretation of the STA was based on differing conceptions of the nature of the writers' employment relationship with the Employers at the conclusion of their PSAs or when the Employers exercised their "pay or play" rights during the term of a PSA. While the Employers asserted that the employment relationship was then extinguished, the Unions argued that the exercise of the Companies' "pay or play" rights did not end the former strikers' employment, but only eliminated their obligation to render services during the employment period(s) remaining in their then-current PSAs. Thus, the Unions argued:

when the Companies refused to accept offers by each of the striking writers to continue employment on his or her show after the expiration of their pre-strike PSA, and instead retained replacement writers on their respective shows, the Companies violated the STA.

Similarly, the Unions stated that, when each of the striking writers,

made offers to continue their employment <u>after</u> the period covered by his or her contract <u>had</u> elapsed -- i.e., the period of time paid out by the Companies pursuant to the pay or play provision in the writer's PSA -- [the Employers] violated the STA when they refused to continue employing the striking writers and continued to employ the replacement writers.

These assertions can reasonably be read as imposing only a one-time reinstatement obligation for the Employers under the STA, but setting it, not at the conclusion of the strike, but rather at the conclusion of each striking writers' PSA. Such a reinstatement obligation would be unaffected by the Employers' earlier exercise of their "pay

or play" rights as to the balance of the former strikers' pre-strike PSAs at the end of the strike.

Such an interpretation, the Unions apparently argued, was the only way to give effect to both the STA's provision for the reinstatement of striking writers and its statement that it does not "expand or diminish" the Employers' "pay or play" rights under the MBA. As the Unions stated:

Having accepted this precept, this Arbitrator should find that under the STA a Company's exercise of its pay or play rights merely satisfies the payment obligations of a striking writer's pre-strike PSA. If, after the period of time covered under that PSA has elapsed, the striking writer offers to return to work, the Company may not retain a replacement writer over that striking writer.

Here again, the Unions emphasized the former strikers' offers to "return" to work, and can be read to situate the Employers' reinstatement obligation to a single occasion, after the expiration of the former strikers' PSAs

Significantly, none of the Unions' arguments or assertions in the arbitration was in any way inconsistent with such an arguably lawful object, or clearly indicated that the Unions sought any unlawful continuing preference for former strikers. Thus, even when the Unions argued at the arbitration hearing that "[t]here's no time limit in the contract," this came immediately after the Unions had stated that "we're not seeking a permanent advantage." In addition, counsel for the Unions' comment that neither the Employers nor they had cited any case "holding that such a preference may only be afforded immediately upon the end of a strike" can also be understood as merely stating that they interpreted the Employers' striker reinstatement obligation under the STA to be a one-time preference at the time of the expiration of the former strikers' PSA.

¹² Similarly, the Unions' statement in their brief to the arbitrator that "[t]he STA places no time limitation on this grant of preferred status to striking writers over replacement writers," should be read in context. The Unions had previously articulated the Employers' reinstatement obligation as coming "after the expiration of their pre-strike PSA," or "when each of the striking writers . . . made offers to continue their employment after the period covered by his or her contract had elapsed." Therefore, the "no time limitation" language can certainly be reasonably understood as nevertheless referring to a one-time event.

We recognize that the Unions did not clearly disavow a continuing preference for the former strikers, or even definitively articulate its position as to when the preferences it sought should end. Indeed, the Unions may have subjectively intended some longer-term unlawful preference, but never clearly said so. They were never required to be more specific about these aspects of their grievance, however, because the arbitration was bifurcated and consideration of the specific extent of any Employer liability was postponed until a second stage of the arbitration that ultimately was unnecessary. Thus, the Unions' failure to specify the limits of its position is not inconsistent with an arguably lawful interpretation of the STA, or in any way dispositive of our determination of the Unions' legal position in the arbitration, and it does not establish an illegal objective.

In sum, the Unions' arguments in the arbitration proceeding may be interpreted as seeking a one-time striker reinstatement preference at the expiration of each striker's then-current PSA. The Unions denied that they were seeking any permanent preference or superseniority for the former strikers and they repeatedly emphasized that they were seeking to enforce the STA right of striking writers to "return" to work. In these circumstances, we cannot say that the Unions clearly articulated any illegal objective actionable under footnote 5 of Bill Johnson's. 13 [FOIA Exemption 5

]¹⁴ [FOIA Exemption 5

¹³ For the same reasons, we further conclude that their position in the completed arbitration did not violate their duty of fair representation.

¹⁴ We note that the Employers have not requested the reimbursement of the costs and fees the Employers incurred as a result of the Respondent's arbitration demand and that, in any case, there appears to be no need for this extraordinary remedy. See, e.g., Kidder, 333 NLRB at 1149.

Case 31-CB-12451, et al.

- 12 -

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Accordingly, the Region should dismiss the charges in the instant cases, absent withdrawal.

B.J.K.

^{15 [}FOIA Exemption 5